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**SUITE 500**

**WASHINGTON, D.C. 20036**

(202) 955-9600

FACSIMILE  
(202) 955-9792  
www.kelleydrye.com

DIRECT LINE: (202) 955-9788  
EMAIL: tdaubert@kelleydrye.com

September 5, 2003

**VIA ELECTRONIC DELIVERY**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: Notice of *Ex Parte* Presentation by  
T-Mobile USA, Inc. in CC Docket No. 95-116**

Dear Ms. Dortch:

On September 4, 2003, Thomas Sugrue, and I, on behalf of T-Mobile USA, Inc., and Luisa Lancetti, on behalf of Sprint Corporation, met with FCC staffers John Stanley, Linda Kinney, Jeff Dygert, David Horowitz, Debra Weiner, Sharon Diskin, Jane Halprin, Cheryl Callahan, and Pam Slipakoff, to discuss the above-referenced proceeding and to distribute the attached written presentations. During this meeting, T-Mobile explained that the Commission needed to act quickly to resolve a number of key issues in order to ensure that wireless local number portability ("LNP") can be implemented successfully on November 24, 2003.

Consistent with the positions outlined in the attached written presentations, T-Mobile and Sprint urged the Commission to resolve the rate center dispute in a way that enhances, not inhibits, competition and to clarify that interconnection agreements are not necessary to facilitate wireless LNP. T-Mobile also explained that the Commission has ample legal authority to grant CTIA's Petition for Declaratory Ruling without issuing a new Further Notice of Proposed Rulemaking.


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September 5, 2003  
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As required by Section 1.1206(b), this *ex parte* notification is being filed electronically for inclusion in the public record of the above-referenced proceeding, and a copy is being submitted to all FCC personnel who attended the meeting.

Please direct any questions regarding this matter to the undersigned.

Sincerely,

  
Todd D. Daubert *SNS*  
Counsel to T-Mobile USA, Inc.

Enclosures

cc: John Stanley  
Linda Kinney  
Jeff Dygert  
David Horowitz  
Debra Weiner  
Sharon Diskin  
Jane Halprin  
Cheryl Callahan  
Pam Slipakoff

..T..Mobile..

# **Intermodal Local Number Portability**

**The FCC Can Issue the Needed Clarifications Now**

**Ex Parte Presentation  
in  
CC Docket No. 95-116**

**September 2003**



## RATE CENTER ISSUES

*The FCC can clarify, without issuing another Further Notice of Proposed Rulemaking, that, upon a valid request by an end user, an ILEC must port a telephone number to any wireless carrier that serves (i.e., can originate and terminate calls) the rate center with which the number is associated*

## INTERCONNECTION AGREEMENTS

*The FCC can clarify, without issuing another Further Notice of Proposed Rulemaking, that interconnection agreements are not necessary, and that SLA agreements are sufficient to support porting*



## RATE CENTER ISSUES

*The ILEC position will hinder competition and promote NANP exhaust*

- It is legally, technically and operationally feasible for a customer to port a number from a LEC to a CMRS Provider so long as
  - the serving LEC switch is LNP capable, and
  - CMRS provides its services in the LEC rate center.
- Some ILECs want to limit the ability of many of their customers to port their numbers to CMRS providers by refusing to port unless the CMRS provider also
  - interconnects directly with the serving LEC end office, and
  - first obtains its own set of numbers in the rate center.
- These additional “conditions” have never applied to wireline-wireline LNP and there is no basis for ILECs to claim now that they have no obligation under the Act or the FCC’s rules and policies to port numbers to wireless carriers unless the conditions have been met.
- Unless the FCC rejects the ILECs’ position, intermodal porting will be extremely limited and NANP exhaust will be significantly accelerated because CMRS would be forced to obtain numbers in every rate center within the top 100 MSAs.



## RATE CENTER ISSUES

*The FCC can provide the requested clarification without further notice*

- The FCC should clarify that, upon a valid request by an end user, an ILEC must port a telephone number to any wireless carrier that serves (i.e., can originate and terminate calls) the rate center with which the number is associated.
  - No other preconditions need to be met before the ILEC's "duty to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the Commission," 47 U.S.C. 251(b)(2), is triggered
- In the LNP First Report and Order, the FCC made the following rulings:
  - "LECs are obligated under the statute to provide number portability to customers seeking to switch to CMRS carriers." 11 FCC Rcd 8352, para. 8 (1996)
  - "[S]witching among wireline service providers and broadband CMRS providers, or among broadband CMRS providers" is "changing service providers, not changing services." *Id.* at para. 172.
- In so ruling, the FCC clarified that an end user who wants to switch from a wireline carrier to a wireless carrier is requesting "service provider portability," not "location portability," and the Act requires the LEC to comply with the end user's request.
- The FCC can reemphasize these findings by providing the requested clarification without issuing another further notice of proposed rulemaking.



## INTERCONNECTION AGREEMENTS

*SLAs are legally sufficient to facilitate portability*

- On the eve of the deadline for implementing wireless LNP, certain ILECs now claim that the Act compels them to enter into interconnection agreements with every carrier to which or from which it ports number.
- There is no legal reason why carriers must have interconnection agreements to facilitate portability.
  - The Act does not require wireless carriers to negotiate amendments to interconnection agreements solely for the purpose of number portability.
  - A majority of commenters, including Sprint, Verizon and BellSouth, recognize that the Act does not require ILECs to enter into interconnection agreements with carriers solely to facilitate number portability.
  - Portability does not involve interconnection per se between the two porting carriers because porting has no effect on routing or rating.



## INTERCONNECTION AGREEMENTS

*SLAs are sufficient to address all relevant issues*

- There is no practical reason why carriers must have interconnection agreements to support number porting
  - Routing and call completion work today – portability does not impact routing and call completion within local calling areas.
  - The FCC, not the states, enforces the portability requirements, but the Section 252 negotiation procedure would needlessly drag the states into the process and increase delays and costs.
  - A number of major ILECs, including Sprint and Verizon, agree that interconnection agreements are not necessary, but other ILECs are refusing to even enter into negotiations about SLAs to implement portability.
- An ILEC's obligation to port numbers under the Act and the FCC's rules and policies has never been limited to only those wireline carriers with which it has an interconnection agreement, and thus the FCC can clarify, without issuing another Further Notice of Proposed Rulemaking, that wireless carriers need not have interconnection agreements with ILECs to facilitate LNP





## CONCLUSION

### *FCC Action Can Remove the Obstacles to Universal Portability Without Issuing Another Further Notice of Proposed Rulemaking*

- The FCC should resolve the rate center issue by requiring wireline carriers to accept a customer's request to port-out to a wireless carrier of his or her choice.
- The FCC should resolve the SLA/interconnect agreement controversy by clarifying that interconnection agreements are not necessary, and that SLA agreements are sufficient to support porting.
- The FCC can make both clarifications now without issuing another Further Notice of Proposed Rulemaking.





September 2, 2003

***Via Electronic Mail Delivery***

John A. Rogovin, General Counsel  
Office of General Counsel  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Mr. William Maher, Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Mr. John Muleta, Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re:   *Written Ex Parte Communication***  
***CTIA Wireless LNP Implementation Declaratory Ruling Petitions,***  
***CC Docket No. 95-116***  
***Sprint Declaratory Ruling Petition Regarding Traffic Routing and Rating,***  
***CC Docket No. 01-92***

Gentlemen:

This letter addresses certain concerns that have been raised regarding the authority of the FCC to grant the relief sought in the above dockets given the current state of the record. Specifically, the question has arisen whether sufficient notice has been provided under the Administrative Procedure Act, 5 U.S.C. § 553(b) ("APA"). As discussed below, the relief sought in both the CTIA Petitions and the Sprint Petition is an affirmation and clarification of existing rules and the resolution of a controversy under existing law – not a rule change. Indeed, denial of the Petitions would more likely result in a modification of existing law. Accordingly, the notice provided in both cases is wholly sufficient under APA requirements and the relief sought should be granted.

This letter is confined to the legal issue of notice and compliance with the APA. However, Sprint continues to encourage the Commission to grant the pending Petitions on legal and policy grounds, as more fully set forth in the various comments and *ex parte* filings already made in these dockets.

## Background

On January 23, 2003, CTIA filed a petition for declaratory ruling regarding the obligations of ILECs under the existing local number portability ("LNP") rules when porting from and to wireless carriers.<sup>1</sup> The Wireless and Wireline Bureaus issued a *Public Notice*, and this *Public Notice* was thereafter published in the Federal Register,<sup>2</sup> even though the APA does not require such publication for declaratory ruling petitions.<sup>3</sup> On May 13, 2003, CTIA filed a further petition for declaratory ruling raising several additional issues and once again a *Public Notice* was issued and published in the Federal Register.<sup>4</sup> Comments and reply comments have been submitted as well as numerous *ex parte* filings, and all issues have been briefed before the Commission.

On May 9, 2002, Sprint filed a petition for declaratory ruling regarding ILEC routing and rating of mobile-to-land traffic. The Wireless and Wireline Bureaus issued a *Public Notice*,<sup>5</sup> and this *Public Notice* was published in the Federal Register.<sup>6</sup> Extensive comments, reply comments and *ex parte* filings have also been made in this docket, and ILECs acknowledge that this petition "is certainly ripe for Commission decision and the Commission should decide it."<sup>7</sup>

The question has now been asked whether the recent appellate court decision, *Sprint v. FCC*, 315 F.3d 369 (D.C. Cir. 2003), precludes the FCC from rendering declaratory rulings on these petitions and requires the FCC to issue a new notice of proposed rulemaking ("NPRM") before granting the relief CTIA and Sprint seek. Sprint demonstrates in Part IV below that this court decision actually supports action on the Sprint rating/routing petition as well as the major-

<sup>1</sup> See *Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association, In the Matter of Telephone Number Portability*, CC Docket 95-116 (Jan. 23, 2003).

<sup>2</sup> See *FCC, Telephone Number Portability*, CC Docket 95-116, 68 Fed. Reg. 7323 (Feb. 13, 2003).

<sup>3</sup> See, e.g., *Sanyo Manufacturing Corp.*, 3 FCC Rcd 1864 ¶ 6 (1988), citing *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976). Although the FCC was not required to publish its public notice in the Federal Register, this publication satisfied that APA content requirements for rulemaking proceedings, because the Public Notice contained "a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

<sup>4</sup> See *Petition for Declaratory ruling of the Cellular Telecommunications & Internet Association, In the Matter of Telephone Number Portability*, CC Docket No. 95-116 (May 13, 2003), summarized in 68 Fed. Reg. 3457 (June 10, 2003).

<sup>5</sup> See *Public Notice, Comment Sought on Sprint Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs*, CC Docket No. 01-92, DA 02-1740 (July 18, 2002).

<sup>6</sup> See *FCC, Routing and Rating of Traffic by Incumbent Local Exchange Carriers (ILECs)*, CC Docket No. 01-92, 67 Fed. Reg. 51581 (Aug. 8, 2002).

<sup>7</sup> Verizon Opposition, CC Docket No. 95-116, at 11 (June 13, 2003). See also BellSouth Comments, CC Docket No. 95-116, at 11 (June 13, 2003) ("BellSouth agrees that this [Sprint] issue must be resolved."); CTIA Declaratory Ruling Petition, CC Docket No. 95-116, at 24 (May 13, 2003) ("The Commission should promptly resolve the intercarrier dispute between BellSouth and Sprint.")

ity of issues raised in the CTIA petition.<sup>8</sup> Moreover, and by contrast, a ruling purporting to relieve ILECs from their obligations under Sections 251(a), 251(b)(2) and 251(b)(5) would be in direct violation of the Communications Act and the FCC's implementing regulations.

It is important to emphasize from the outset that courts have long held that agencies possess broad discretion in deciding whether to proceed *via* a rulemaking or declaratory ruling.<sup>9</sup> This is true "regardless of whether the decision may affect agency policy and have general prospective application."<sup>10</sup>

Sprint demonstrates below that not only is a rulemaking unnecessary to grant these petitions, but also that the FCC would be required to complete a *new* rulemaking before it could deny the relief Sprint and CTIA seek, because the petitions ask only that the FCC enforce existing statutory and regulatory law.

#### **I. The Administrative Procedures Act Authorizes the FCC to Grant a Declaratory Ruling to Terminate a Controversy**

The APA expressly authorizes agencies like the FCC to "issue a declaratory order to terminate a controversy or remove uncertainty," with Congress further specifying that declaratory order have "like effect as in the case of other orders."<sup>11</sup> The FCC's own rules further recognize that the FCC may issue a declaratory ruling terminating a controversy or removing uncertainty."<sup>12</sup> In this regard, courts have expressly held that "an interpretation of . . . regulations by . . . declaratory ruling . . . [is] well within the scope of the familiar power of an agency to interpret the regulations within the framework of an adjudicatory proceeding."<sup>13</sup> Declaratory ruling proceedings, like proceedings involving an "interpretative rule,"<sup>14</sup> are exempt from the APA's no-

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<sup>8</sup> CTIA raises several issues in its two petitions and Sprint does not attempt to discuss each of them here. However, with respect to the issues most critical to implementation of LNP -- the rate center issue, interconnection obligations and the alleged requirement of direct connection -- CTIA seeks only the enforcement of existing obligations and not a change of an existing rule.

<sup>9</sup> See, e.g., *NLRB v. Bell Aerospace*, 416 U.S. 267, 291-95 (1974); *SEC v. Chenery*, 332 U.S. 194, 203 (1947); *RTC Transportation v. ICC*, 731 F.2d 1502, 1505 (11<sup>th</sup> Cir. 1984); *Viacom International v. FCC*, 672 F.2d 1034, 1042 (D.C. Cir. 1982); *New York State Comm'n v. FCC*, 669 F.2d 58, 62 (2d Cir. 1982); *25 Large Oceangoing Cargo Ships*, 5 FCC Rcd 594, 595 ¶ 13 (1990).

<sup>10</sup> *New York State Comm'n v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984), quoting *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976).

<sup>11</sup> 5 U.S.C. § 554(e).

<sup>12</sup> 47 C.F.R. § 1.2.

<sup>13</sup> *British Caledonian Airways v. CAB*, 584 F.2d 982, 993 (D.C. Cir. 1978), quoting *Trans International Airlines v. CAB*, 432 F.2d 697, 612 n.9 (D.C. Cir. 1970).

<sup>14</sup> See 5 U.S.C. § 553(b)(3)(A).

tice and comment rulemaking requirements.<sup>15</sup> Thus, it was not necessary for the Bureaus to publish notice of either CTIA or Sprint's petitions in the Federal Register.

The numerous comments submitted in response to these petitions confirm that there is a major controversy between wireless carriers and incumbent LECs (and rural ILECs in particular) over whether ILECs may, under existing law, refuse to honor the rating and routing points designated by wireless carriers for their telephone numbers (NXX codes or thousands blocks) and whether such carriers must satisfy their statutory porting obligations. As Sprint's recent *ex parte* filing regarding the CTIA petition demonstrates, carriers across the country are currently denying their obligation to implement number portability with wireless carriers.<sup>16</sup> Likewise, the controversy which prompted Sprint's original rating and routing petition, the ability to establish local numbers within the Northeast Telephone Company's exchange area, remains unresolved.

Congress designed the declaratory ruling procedure precisely to "terminate a controversy or remove uncertainty."<sup>17</sup> As courts have noted, the "only result [of commencing a new rulemaking now] would be delay while the Commission accomplished the same objective under a different label. Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit of petitioners' comments."<sup>18</sup> Action is needed to ensure that consumer choice, and FCC expectations regarding LNP are met in November.

## **II. A New Rulemaking Is Not Required Because Sprint and CTIA Seek Confirmation of Existing Law; In Fact, the FCC May Not Deny these Petitions without Completing a New Rulemaking**

It is axiomatic that an NPRM published in the Federal Register is necessary before an agency may change existing rules that were adopted in an APA rulemaking proceeding. *See* Part IV *infra*. Here, however, both the CTIA and Sprint's petitions ask the FCC only to confirm *existing* legal requirements. With respect to the CTIA Petitions:

- The Communications Act imposes an affirmative obligation on all local exchange carriers ("LECs") "to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the Commission."<sup>19</sup>
- The Commission has adopted rules establishing the requirements for number portability, and nothing contained in these rules permits LECs to refuse porting

<sup>15</sup> See, e.g., *Sanyo Manufacturing Corp.*, 3 FCC Rcd 1864 ¶ 6 (1988), citing *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

<sup>16</sup> Sprint Corporation *Ex Parte* Letter, CC Docket No. 95-116 (Aug. 8, 2003).

<sup>17</sup> 5 U.S.C. § 554(e).

<sup>18</sup> *Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

<sup>19</sup> 47 U.S.C. §251(b)(2).

based upon the existence of numbers in a rate center or the existence of an interconnection agreement.<sup>20</sup>

The CTIA Petitions merely seek the nondiscriminatory application of existing rules and industry guidelines. CTIA does not seek modification of existing rules regarding rate centers, interconnection agreements or points of presence. To the contrary, CTIA seeks enforcement of existing law. Indeed, if the Commission were to find that wireless carriers must first establish numbering resources in each rate center from which it receives a port, or establish an interconnection agreement addressing compensation issues, the Commission would in effect be establishing new requirements and obligations on wireless carriers before they could seek portability. Such a finding would not only amount to rule change but would be in direct violation of the Act and the FCC's implementing rules and orders.

With respect to Sprint's Petition:

- FCC rules specify that a LEC "must provide the type of interconnection reasonably requested by a mobile services licensee or carrier,"<sup>21</sup> and the FCC long ago held that LECs must provide Type 2 interconnection upon request.<sup>22</sup> With Type 2 interconnection, a wireless carrier's routing point is located at the LATA tandem switch, while its rating points are located at various local calling areas within the LATA.<sup>23</sup> The FCC has thus already recognized that wireless carriers can have different rating and routing points – the very point Sprint asks the FCC to reaffirm in its declaratory ruling petition.
- The Communications Act permits a wireless carrier to interconnect indirectly with other carriers.<sup>24</sup> The FCC has, moreover, interpreted the Act to mean that wireless and other competitive carriers need establish only "one POI per LATA"<sup>25</sup> – meaning that there may be only one routing point in the LATA. The FCC has also recognized that carriers "typically need numbering resources in multiple rate cen-

<sup>20</sup> See 47 C.F.R. §§ 52.2 *et seq.*

<sup>21</sup> 47 C.F.R. § 20.11(a). See also *Bowles v. United Telephone*, 12 FCC Rcd 9840, 9849 ¶ 15 (1997) ("LEC is obligated to provide a CMRS provider with the interconnection of its choice upon its request."); *Third Radio Common Carrier Order*, 4 FCC Rcd 2369, 2376 ¶ 41 (1989).

<sup>22</sup> See FCC Policy Statement on Interconnection of Cellular Systems, 59 R.R.2d 1275 ¶ 2 (1986), *aff'd* 2 FCC Rcd 2910 (1987) and 4 FCC Rcd 2369 (1989).

<sup>23</sup> See *Notes on the Network*, TR-NPL-000275, Section 16, at 16-2, § 2.03 (1986) ("Through [Type 2 interconnection], the [wireless carrier] can establish intra-LATA connections to BOC end offices connected to the tandem and to other carriers interconnected through the tandem.") (emphasis added).

<sup>24</sup> See 47 U.S.C. § 251(a)(1).

<sup>25</sup> *Unified Inter-carrier Compensation Regime*, 16 FCC Rcd 9610, 9634 ¶ 72 (2001). See also *Virginia Arbitration Order*, 17 FCC Rcd 27039 at ¶ 52 (2002).

ters to establish to establish a footprint in a particular geographic area,”<sup>26</sup> – meaning that carriers will have multiple rating points in a LATA. Thus, FCC has again recognized that wireless carriers may have a routing point that is different from their rating points – the very point Sprint asks the FCC to reaffirm in its declaratory ruling petition.

- FCC rules require the administration of telephone numbers pursuant to industry guidelines.<sup>27</sup> Industry guidelines acknowledge that carriers provide the routing and rating points for their telephone numbers and that the routing and rating points may be different<sup>28</sup> – the very point Sprint asks the FCC to reaffirm in its declaratory ruling petition.

To deny Sprint’s petition, the FCC would have to hold that wireless carriers must always have the same routing and rating points for their telephone numbers – a holding that would necessarily require the Commission to amend its existing rules and long-standing interpretation of both the Act and its rules. Sprint submits that the FCC cannot deny the Sprint petition without first completing a new rulemaking that changes its existing rules.

### **III. With Respect to the Sprint Petition, the FCC Also Has an Option to Enter a Discrete Order in Its Pending Docket 01-92 Rulemaking Proceeding**

The Wireless and Wireline Bureaus have noted that the “Sprint Petition and BellSouth’s Opposition raise interconnection and intercarrier compensation issues under consideration in CC Docket No. 01, *Developing a Unified Intercarrier Compensation Regime*, 66 FR 28410, May 23, 2001).”<sup>29</sup> The Bureaus have therefore directed parties to “file their pleadings in CC Docket No. 01-92,” stating that the Sprint “petition and other pleadings will be incorporated into CC Docket No. 01-92.”<sup>30</sup>

The Docket 01-92 rulemaking is a massive proceeding, touching virtually all aspects of intercarrier interconnection and compensation. The APA does not require agencies to complete rulemakings in a single order addressing all the issues raised in the NPRM. To the contrary, the FCC possesses the flexibility to address different issues in different orders, even though the issues may have all been raised in a single NPRM. In this regard, courts have noted “the broad discretion with which Congress has invested the Commission to adopt whatever procedures will

<sup>26</sup> *Second NRO Order*, 16 FCC Rcd 306, 366 ¶ 114 (2002). *See also First NRO Order*, 15 FCC Rcd 7574, 7577 n.2 (2000) (“A carrier must obtain a central office code for each rate center in which its provides service in a given area code.”).

<sup>27</sup> *See* 47 C.F.R. § 52.15(d).

<sup>28</sup> *See* Industry Numbering Committee, Central Office Code Assignment Guidelines at §§ 6.2.1, 6.2.2.

<sup>29</sup> *See Public Notice*, Routing and Rating of Traffic by Incumbent Local Exchange Carriers (ILECs), CC Docket No. 01-92, 67 Fed. Reg. at 51582 (Aug. 8, 2002).

<sup>30</sup> *Id.*

best conduce to the proper dispatch of business and to the ends of justice.”<sup>31</sup> Thus, rather than issue the declaratory order that Sprint has requested, the FCC could alternatively grant the requested relief by entering a report and order in its CC Docket No. 01-92 rulemaking proceeding.<sup>32</sup>

This being said, however, action should not be further delayed pending resolution of all the issues raised in the *Intercarrier Compensation* docket. The Sprint Petition has been fully briefed and is ripe for resolution now, as many ILECs and other commenters acknowledge.<sup>33</sup>

#### **IV. Sprint v. FCC, 315 F.3d 369 (D.C. Cir. 2003) Confirms That the FCC Need Not Commence a New Rulemaking Before Acting on the CTIA or Sprint Rating/Routing Petitions**

The recent court decision involving payphone compensation, *Sprint v. FCC*, 315 F.3d 369 (D.C. Cir. 2003), confirms that the FCC need not commence a new rulemaking before acting on the CTIA or Sprint declaratory ruling petitions.

In its *First Payphone Reconsideration Order*,<sup>34</sup> the FCC ruled that that the “facilities-based” interexchange carrier (“IXC”) should compensate the payphone owner for toll calls originated on the payphone. In the *Second Payphone Reconsideration Order*,<sup>35</sup> the FCC “modif[ie]d” our rules to require the first” IXC to compensate the payphone owner.

The FCC did not adopt its *Second Payphone Reconsideration Order* in response to a reconsideration petition, nor did the FCC issue a new NPRM. Instead, it adopted its *Second Payphone Reconsideration Order* in response to a clarification petition filed by a coalition of payphone owners. This petition complained that payphone owners were not being adequately compensated under the arrangements adopted in the *First Payphone Reconsideration Order*, and it urged that the FCC require the IXC identified by the Carrier Identification Code (“CIC”) to compensate the payphone owner. The FCC requested comment on the coalition petition, but it did not publish this public notice in the Federal Register and the revised rules eventually adopted in the *Second Payphone Reconsideration Order* were different than what the coalition petition had requested (with the FCC specifically rejecting the CIC solution that had been proposed). In

<sup>31</sup> *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1221 (D.C. Cir. 1984)(supporting citations omitted).

<sup>32</sup> Because Sprint’s petition seeks reaffirmation and enforcement of existing law, it may be more appropriate to enter a declaratory order rather than a report and order in Docket No. 01-92, because it would appear that the FCC can achieve its objective for this rulemaking – develop a unified intercarrier compensation regime – only by having a vision of how all intercarrier interconnection should be accomplished.

<sup>33</sup> See note 7 *supra*.

<sup>34</sup> *First Payphone Reconsideration Order*, 11 FCC Rcd 10893 (1996), *aff’d in part, rev’d in part on other grounds*, *Illinois Public Telecommunications Ass’n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997).

<sup>35</sup> *Second Payphone Reconsideration Order*, 16 FCC Rcd 8098 ¶ 1 (2001).



*Sprint v. FCC*, the D.C. Circuit held that the FCC had “failed to provide adequate notice and opportunity to comment” and thus contravened the requirements of the APA.<sup>36</sup> In other words, the Court held only that the FCC may not change a rule adopted in a rulemaking proceeding without commencing a new rulemaking proceeding that complies with APA requirements.

Importantly, the D.C. Circuit reaffirmed in *Sprint* that the FCC may continue to issue declaratory rulings to clarify or enforce existing law. The Court stated:

Underlying these general principles is a distinction between rulemaking and clarification of an existing rule. Whereas a clarification may be embodied in an interpretative rule that is exempt from notice and comment requirements, new rules that work substantive changes in prior regulations are subject to the APA’s procedures. Thus, the court described as “a maxim of administrative law” the proposition that, “if a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.”<sup>37</sup>

To illustrate this distinction, the Court specifically noted that in 1998 the Bureau had properly interpreted and clarified the FCC’s *First Payphone Reconsideration Order*, even though the Bureau did not issue a NPRM and did not publish its Public Notice in the Federal Register.<sup>38</sup>

*Sprint* in its declaratory ruling petition does not ask the FCC to repudiate or change any existing FCC requirement. As noted above, *Sprint* seeks only to confirm and enforce existing law. Similarly, CTIA’s petitions regarding the application of rate center porting requirements, interconnection obligations and points of presence do not advocate a change of existing law, but only an affirmation of existing law. Although the FCC here has complied fully with the APA requirements for rulemaking proceedings in the *Sprint* petition (by publishing notice of the petition in the Federal Register and by seeking comment on the petition as part of a broader pending rulemaking), the fact remains that the FCC could have granted the *Sprint* petition even without following these procedures.

Conversely, as also demonstrated above, because it is the opponents of the CTIA and *Sprint* petitions that seek to change existing law, the Commission cannot deny these petitions without a new rulemaking proceeding that changes existing law. Indeed, denial of these Petitions may be in direct violation of the statutory obligations imposed on LECs under the Act.

The FCC has long used its declaratory ruling authority to clarify existing law regarding the interconnection obligations of LECs.<sup>39</sup> *Sprint* submits that in this instance, existing law re-

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<sup>36</sup> *Sprint v. FCC*, 315 F.3d 369, 371 (D.C. Cir. 2003).

<sup>37</sup> *Id.* at 374 (internal citations omitted).

<sup>38</sup> *See id.* at 372 and 374.

<sup>39</sup> *See, e.g.*, FCC Policy Statement on Interconnection of Cellular Systems, 59 R.R.2d 1275 ¶ 2 (1986), *aff’d* 2 FCC Rcd 2910 (1987) and 4 FCC Rcd 2369 (1989). Indeed, courts have held that state preemption decisions involving interconnection issues are “appropriate for disposition by declaratory ruling.” *North Carolina Utilities Comm’n v. FCC*, 537 F.2d 787, 791 n.2 (4<sup>th</sup> Cir), *cert. denied*, 429 U.S.

garding ILEC interconnection obligations to wireless carriers is not ambiguous. Nevertheless, some ILECs have decided unilaterally that they will no longer comply with this law, and entry of the requested declaratory ruling is thus necessary "to terminate a controversy or remove uncertainty."<sup>40</sup> To confirm, the successful deployment of LNP is at issue.

Pursuant to Section 1.1206 of the Commission's *ex parte* rules, this letter is being electronically filed with the Secretary's office. Please associate this letter with the file in the above referenced matters.

Respectfully submitted,



Luisa L. Lancetti  
Vice President, PCS Regulatory Affairs  
Sprint Corporation  
401 9<sup>th</sup> Street, N.W., Suite 400  
Washington, D.C. 20004  
202-585-1923

Charles W. McKee  
General Attorney  
Sprint Corporation  
6450 Sprint Parkway  
Mail Stop: KSOPHN0212-2A553  
Overland Park, KS 66251  
913-315-9098

cc: Linda Kinney	Matt Brill	Paul Margie
Jeff Dykert	Jennifer Manner	Jessica Rosenworcel
Mary McManus	Sam Feder	Cathy Seidel
David Horowitz	Dan Gonzalez	Jared Carlson
Robert Tanner	Scott Bergmann	Walter Strack
Carol Matthey	Barry Ohlson	Joseph Levin
Eric Einhorn	Bryant Tramont	Jennifer Tomchin
Cheryl Callahan	Christopher Libertelli	Jennifer Salhus

1027 (1976). If the FCC can lawfully utilize declaratory rulings for persons not subject to its regulatory authority, it certainly can use this procedure for telecommunications carriers subject to its jurisdiction.

<sup>40</sup> 5 U.S.C. § 554(e). See also 47 C.F.R. § 1.2.

08/04/2003 16:04 FAX 425 378 4820

P.O. Box 4065  
Monroe, LA 71211-4065  
Tel 318 388 9000

**CERTIFIED MAIL**

July 31, 2003

Shannon Reilly  
T-Mobile  
12920 SE 38<sup>th</sup> Street  
Bellevue, WA 98006

Dear Ms. Reilly,

I have been forwarded your letter of July 28, 2003 to Chris Czeschin, CenturyTel's Senior Analyst- CARE. Your letter seeks the implementation of a Local Number Portability Operation agreement prior to LNP testing and implementation. As stated in my March 4, 2003 correspondence to you, for the several reasons documented therein and which have not been changed by FCC Order or clarification as of this date, CenturyTel does not recognize your letters as legitimate requests to enter into any agreement for number portability.

Despite the assertion in your letter, CenturyTel does not concur that the FCC's Orders have clearly mandated wireline to wireless porting. The FCC's recent 4<sup>th</sup> Report and Order did confirm the schedule for wireless to wireless porting but did not address the many unanswered factual questions surrounding wireline to wireless porting. These questions include:

1. How does the wireless carrier ensure that the portability of the number is limited to service provider portability (as required by Commission rules) and does not become unauthorized geographic portability? In other words, when a wireline customer ports his or her number to a wireless carrier, nothing prevents that customer from moving with the number to a new geographic location and maintaining service with the ported number. This is currently not authorized by existing FCC LNP regulations.
2. How does a call from a wireline customer go through to a wireless customer using the same NPA/NXX if the wireless carrier has not established interconnection with the wireline company whose numbers it has ported?

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Since you cite the FCC's Part 51 and 52 obligations for LNP provision, I must in turn cite the FCC's First Report and Order on Number Portability which define LNP and which states that "[t]he term 'number portability' means the ability of users of telecommunications services to retain, **at the same location**, existing telecommunications numbers..." In the Second Report and Order, the FCC states "Portability is technically **limited to rate center/rate district boundaries of the Incumbent LEC** due to rating/routing concerns." This was codified in Part 52.26 of the Commission's rules. Elsewhere in the FCC's First Order, it is very clearly stated that they "do not mandate" location porting at this time. By FCC regulation, therefore, porting is restricted to customers who exist and remain within the original LEC rate center. Neither T-Mobile's original request nor your latest letter legally certifies that your porting requests will only be for non-location porting- porting to non-mobile wireless telephones located within our rate center.

CenturyTel contends that the FCC's silence on the above issues is acquiescence to the unjust policy implications surrounding wireline to wireless portability and that therefore, pending resolution of these issues, wireline companies have no obligation to accept location porting requests from a wireless carrier until these issues are resolved. There is currently a proceeding underway at the FCC, which seeks to determine if wireline to wireless porting should in fact be required. Your own industry association, CTIA, even acknowledges that wireline to wireless porting is not clearly mandated since it seeks the FCC's order to make it so.

If the current proceeding does resolve the issues inherent in wireline to wireless porting (which is not a foregone conclusion), then prior to any exchange of information as you request in your letter, T-Mobile must submit BFRs that conform to existing FCC rules for LNP BFRs.

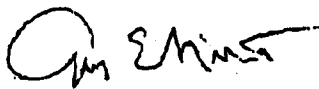
The FCC rules currently require that a separate BFR must be submitted for each CenturyTel Operating Company (Incumbent Local Exchange Carrier - "ILEC") where LNP would be required and the BFR must list the specific wire centers where T-Mobile intends to submit porting orders, and T-Mobile may not list wire centers that are not currently in the T-Mobile serving area.

Regarding your request to enter into an "Operating Agreement" with CenturyTel, there cannot legally be any single agreement with "CenturyTel" as there are currently 73 legal entity Operating Companies (ILECs) in 22 states that are under the CenturyTel umbrella name. Also, as CenturyTel understands the FCC regulations, CenturyTel would not entertain an LNP only agreement. Rather, when wireline to wireless portability is mandated at some future point, T-Mobile must have an interconnection agreement in place with specific Operating Companies in which you wish to exchange traffic and have the capability to port. Any current CMRS agreement would not provide for local number portability until the FCC resolves the outstanding issues and positively orders how wireline to

wireless portability is to be effected. At that future time, we can negotiate addendums to add the porting capability to your agreements.

Please feel free to contact me further with your specific requests for any new agreements.

Sincerely,



Guy Miller  
Corporate Director- Carrier Relations  
CenturyTel Service Group

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## Local Number Portability Correspondence Attachment

### Excerpts from the FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING; Adopted: June 27, 1996

8) ... be able to accommodate location and service portability *in the future*;

58. ... *we do not at this time mandate provision of service or location portability*

176. Most parties agree that implementation of location portability poses many problems, including: (1) loss of geographic identity of one's telephone number; (2) lack of industry consensus as to the proper geographic scope of location portability; (3) substantial modification of billing systems and the consumer confusion regarding charges for calls; (4) loss of the ability to use 7-digit dialing schemes; (5) the need to restructure directory assistance and operator services; (6) coordination of number assignments for both customer and network identification; (7) network and switching modifications to handle a two-tiered numbering system; (8) development and implementation of systems to replace 1+ as toll identification; and (9) possible adverse impact on 911 services.

181. *We decline at this time to require LECs to provide either service or location portability. This decision is not inconsistent with the 1996 Act, which mandates the provision of service provider portability, but does not address explicitly service or location portability. The 1996 Act's requirement to provide number portability is limited to situations when users remain "at the same location," and "switch" from one telecommunications carrier to another," and thus does not include service and location portability.*

### Excerpts from the SECOND REPORT AND ORDER ; Adopted: August 14, 1997

4.... The 1996 Act defines "number portability" as "the ability of users of telecommunications services to retain, *at the same location*, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." Number portability is essential to meaningful *facilities-based competition* in the provision of *local exchange service*...

### USC 47: Sec. 52.23 Deployment of long-term database methods for number portability by LECs.

(a) Subject to paragraphs (b) and (c) of this section, all local exchange carriers (LECs) must provide number portability in compliance with the following performance criteria:

- (1) *Supports network services, features, and capabilities existing at the time number portability is implemented, including but not limited to emergency services, CLASS features, operator and directory assistance services, and intercept capabilities;*
- (7) *Is able to migrate to location and service portability;*